

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-16

COMMONWEALTH

vs.

PURCY BRICE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant, Purcy Brice, was convicted of distribution of cocaine, possession of cocaine with intent to distribute, two counts of committing a drug violation within 300 feet of a public park or playground, and possession of a class B controlled substance. On appeal, the defendant argues that a new trial is warranted due to improper expert witness testimony. We affirm.

Background. As part of an investigation, the Everett and Malden Police Departments set up a controlled buy, using Everett Police Detective Robert Hall as an undercover purchaser. Hall placed a telephone call to an individual asking to purchase crack cocaine, and eventually an arrangement was made to meet at a park in Malden. Officers surveilled the area and observed the controlled buy. When Hall arrived at the park, he saw only one

individual, later identified as the defendant, sitting on a park bench alone. Hall sat next to the defendant and handed him a water bottle with \$100 in cash. The defendant took the money, turned away from Hall to count it, and then "fumbl[ed]" with something on the left side of his body. The defendant then handed Hall three small, clear, knotted plastic bags, each containing an off-white, rock-like substance, later determined to be cocaine. Hall gave surveillance officers a signal indicating that the transaction was complete, and he and the defendant left the park. The surveillance officers approached the defendant and told him that he was under arrest. The defendant attempted to flee, and a brief struggle took place as officers detained him. During this struggle, a cell phone and \$100 in cash fell from the defendant's person. This money was later confirmed to be the prerecorded money used in the controlled buy. A search of the defendant at the police station revealed thirteen bags of crack cocaine, \$786 in cash, a digital scale, seven oxycodone pills, and marijuana. Officers did not find any drug paraphernalia consistent with personal use on the defendant.

Discussion. 1. Detective qualified as expert witness. At trial, Wakefield Police Detective Christopher Grace testified as an expert. The defendant argues that Grace lacks the specialized training to qualify as an expert. We disagree.

A judge has "broad discretion with respect to the admissibility of expert testimony," Commonwealth v. Morris, 82 Mass. App. Ct. 427, 431 (2012), quoting Commonwealth v. Mamay, 407 Mass. 412, 421 (1990), and the "decision to admit expert testimony is subject to review only for abuse of discretion." Commonwealth v. Roderiques, 462 Mass. 415, 428 (2012). "The crucial issue, in determining whether a witness is qualified to give an expert opinion, is whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony" (quotations and citation omitted). Commonwealth v. Richardson, 423 Mass. 180, 183 (1996). "[T]rial judges have broad discretion to allow the use of narcotics investigators as experts in drug cases," and once so qualified, these investigators routinely describe how drug transactions occur on the street level. Commonwealth v. Miranda, 441 Mass. 783, 793-794 (2004).

Grace testified to his relevant experience during voir dire and at trial. At the time of trial, Grace was a member of the Southern Middlesex regional drug task force and had been a Wakefield police officer for twenty-two years, the last eight of which were as a detective specializing in narcotics investigations. He had a bachelors degree in criminal justice, and received training in basic narcotics investigations as well as specialized trainings in street-level drug distributions.

The specialized trainings covered surveillance, what a drug deal looks like, how to operate a controlled buy, how to write and execute search warrants, and how to make arrests. As a detective specializing in narcotics investigations, Grace obtained extensive experience working undercover in controlled buys, including speaking to drug dealers once or twice a month and speaking to drug users on a weekly basis. In total, he had participated in about 500-800 narcotics investigations, which resulted in about 300 arrests, and fifteen to twenty undercover controlled buys where he posed as the individual attempting to purchase drugs.

Based on his training and experience, Grace had sufficient familiarity with the manner in which drugs are packaged for distribution versus personal use, drug-use paraphernalia, and drug users. See Puopolo v. Honda Motor Co., 41 Mass. App. Ct. 96, 98 (1996), quoting Simon v. Solomon, 385 Mass. 91, 105 (1982) ("An expert witness may give testimony 'on matters within the witness's field of expertise [and this testimony] is admissible whenever it will aid the jury in reaching a decision'"). Therefore, we discern no abuse of discretion in the judge's qualification of Grace as an expert witness.

2. Content of expert testimony. Next, the defendant argues that Grace's expert opinion that the defendant possessed thirteen bags of cocaine for purposes of distribution was

speculative, exceeded the bounds of proper expert opinion, and commented on the defendant's guilt. We disagree.

"A qualified narcotics expert is permitted to offer an opinion based upon a hypothetical grounded in facts in evidence, as being consistent with a drug transaction" (quotations and citation omitted). Commonwealth v. Acosta, 81 Mass. App. Ct. 836, 842 (2012). Questions based on previously admitted evidence may be posed to an expert witness to gain his opinion on that evidence, "even if the witness's reply thereby touches on the ultimate issue of the case. The only limitation is that the subject matter discussed be within the witness's field of expertise and that the witness not directly express his views on the defendant's guilt." Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 579 (1998). Ultimately, the issue in such cases is whether the expert testimony is "explanatory. . . . So long as expert testimony is directed to that purpose, it is admissible." Id. at 581.

The defendant argues that Grace speculated in opining that the defendant's possession was more consistent with distribution rather than personal use. However, at trial, Grace testified about how drugs are packaged for street-level distribution and what tools individuals distributing drugs would have on them. Grace also testified to the significance of individually packaged quantities of drugs that sellers versus drug users

would have on their person, and the tools that drug users would have on their person. Accordingly, Grace's testimony was not speculative, but rather based on his training and experience as well as the evidence presented at trial. See Commonwealth v. Johnson, 410 Mass. 199, 202 (1991).<sup>1</sup>

Next, the defendant takes issue with the following exchange during Grace's direct examination:

Q.: "Detective, after reviewing the case materials for this case, were you able to form an opinion as to whether the defendant's possession of 13 bags of cocaine was consistent with possession for personal use or for distribution?"

A.: "Yes."

Q.: "Okay. And what is that opinion?"

A.: "He was possessing it for distribution."

Because no objection to this portion of Grace's testimony was made at trial, our review is limited to determine whether the admission of this testimony created a "substantial risk of a miscarriage of justice." Commonwealth v. Madera, 76 Mass. App. Ct. 154, 160 (2010).

Although Grace's answer "challenged here, [was] not in approved form," it did not result in a substantial risk of a

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<sup>1</sup> Insofar as the defendant argues that the evidence against him was equally consistent with a theory that he had drugs on him for personal use, this argument goes to the weight of the evidence. "The weight and credibility of the evidence is the province of the jury." Commonwealth v. Dubois, 451 Mass. 20, 28 (2008). See Commonwealth v. Cowen, 452 Mass. 757, 762 (2008) ("The matter of how much weight is to be given a witness, particularly an expert witness, is a matter for the trier of fact, not an appellate court").

miscarriage of justice. Madera, 76 Mass. App. Ct. at 163. Grace did not merely present his opinion "in conclusory form." Commonwealth v. Grissett, 66 Mass. App. Ct. 454, 458 (2006), quoting Tanner, 45 Mass. App. Ct. at 581. He explained how he reached this opinion based on the facts surrounding the controlled buy, the money and packaged drugs found on the defendant, and his familiarity with drug users and drug dealers. Although it would have been preferable for Grace to have utilized the "talismanic 'consistent with' locution," Tanner, supra at 580, his testimony drew on his vast experience in narcotics investigations, and his review of the evidence surrounding the defendant's arrest.<sup>2</sup>

In addition, the evidence of intent to distribute was strong. The jury heard facts surrounding the controlled buy, where officers observed, firsthand, the defendant sell crack cocaine to Hall. During his arrest, the same prerecorded money used in the undercover buy as well as a cell phone fell from the defendant's person. When Hall called the telephone number he had used to arrange the controlled buy, his call went through to this cell phone. Thirteen bags of cocaine, packaged in the same manner as the three bags sold to Hall, were also retrieved from

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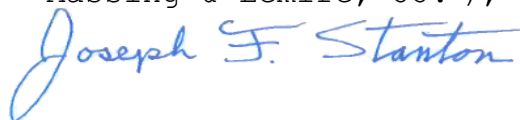
<sup>2</sup> Because Grace was a nonpercipient witness, the risk of prejudice was not as great. See Commonwealth v. MacDonald, 459 Mass. 148, 163-164 (2011); Madera, 76 Mass. App. Ct. at 163.

the defendant, as well as \$786 in cash and a digital scale. See Tanner, 45 Mass. App. Ct. at 580. "Thus, even without the improper opinion, the evidence created a strong inference regarding the nature of the transactions, and contrary to the defendant's argument, the improper testimony was not the only evidence presented regarding distribution." Commonwealth v. Rivera, 425 Mass. 633, 645 (1997). See Commonwealth v. Delgado, 51 Mass. App. Ct. 661, 664 (2001).

Lastly, the Commonwealth did not exploit the inadmissible comment during its closing argument, and the judge instructed the jury on the proper use of expert testimony, including how to weigh such testimony. See Commonwealth v. Rodriguez, 437 Mass. 554, 561 (2002). Therefore, Grace's opinion did not "pollute[] the entire trial" as asserted by the defendant.

Judgments affirmed.

By the Court (Sullivan,  
Massing & Lemire, JJ.<sup>3</sup>),



Clerk

Entered: August 27, 2019.

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<sup>3</sup> The panelists are listed in order of seniority.